

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 5, 2001 Session

JEAN RICK v. MIDDLE TENNESSEE MEDICAL CENTER, INC., ET AL.

Appeal from the Chancery Court for Rutherford County
No. 98MI-201 Don R. Ash, Judge

No. M2000-01662-COA-R3-CV - Filed April 7, 2003

This appeal involves the right of one child of a testator to impose a lien on real property devised to a sibling and subsequently conveyed by that sibling to a third party. In 1996, the probate court having jurisdiction over the estate determined that the property, which had already been conveyed to a third party, could be subjected to a lien if the devisee defaulted on a personal obligation to his sister mandated by their father's will. The devisee thereafter defaulted on his obligation and died. In 1998, his sister filed an action in the Chancery Court for Rutherford County seeking to recover her brother's \$52,500 debt to her by imposing a lien on real and personal property her brother had conveyed to third parties. The trial court, relying on *Hutchinson v. Gilbert*, 86 Tenn. 464, 7 S.W. 126 (1888), held that the testator's daughter had a lien by operation of law against the real property devised to her brother and directed that the property be sold at auction to satisfy this lien if its current owner did not pay the testator's son's personal \$55,917.57 debt to his sister. The current owner of the real property has appealed. We have determined that the trial court's reliance on *Hutchinson v. Gilbert* is misplaced. We have also determined that neither the will nor the probate court's 1996 order provides a basis for imposing a lien on property already conveyed to a third party.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

William R. O'Bryan and Ryan A. Kurtz, Nashville, Tennessee, for the appellant, Middle Tennessee Medical Center, Inc.

Ewing Sellers, Murfreesboro, Tennessee, for the appellee, Jean Rick.

OPINION

I.

Frank McElroy and his wife devoted their lives to operating the Louisa School, a developmental center for mentally retarded persons. They had two children, James McElroy ("Mr. McElroy") and Jean M. Rick. Mr. McElroy spent "a large portion of his working years" assisting his parents in operating the school. When Frank McElroy executed a will on October 19, 1984, he

specifically mentioned his son's contributions to the school and stated his "strong desire" that his son continue to operate the school after his death. He also named Mr. McElroy as his executor.

Frank McElroy decided to give all his property related to the Louisa School to Mr. McElroy to induce him to continue operating the school. However, he also desired to provide for his daughter. Because he had already given Ms. Rick \$80,000, Mr. McElroy decided that it would be "fair and just" for her to receive another \$120,000 following his death. Knowing that he did not have \$120,000 in assets in addition to property connected with the Louisa School, Frank McElroy included the following provision in his will:

I will, devise and bequeath my stock in Louisa Developmental Center, Inc., and all real estate owned by me and all assets used in the operation of Louisa Developmental Center, Inc., to my son, JAMES R. McELROY, on the condition that he agree in writing within six (6) months from my death to pay my daughter, JEAN M. RICK, One Hundred Twenty Thousand and No/100 Dollars (\$120,000.00) as provided for herein. If my son does not make such election, the assets mentioned in this subsection shall pass in accordance with subsection B below herein. My son shall pay Five Hundred and No/100 Dollars (\$500.00) per month for twenty (20) years to my daughter, JEAN M. RICK, with the first payment to be made within (6) six months of my death.

Subsection III(B) of Frank McElroy's will is a residuary clause leaving equal shares of the residue of his estate to Mr. McElroy and Ms. Rick.

When Frank McElroy died on April 29, 1990, his estate consisted of (1) twenty of the thirty shares of Louisa Developmental Center, Inc., (2) the real property on which the Louisa School was located, (3) other tangible assets used by the Louisa School, and a checking account containing \$730. The value of the property and assets connected with the Louisa School was approximately \$1,100,000. Mr. McElroy, acting as the executor of his father's estate, filed the October 1984 will for probate in the Probate Court for Rutherford County and, on May 25, 1990, was appointed executor of his father's estate.

Mr. McElroy apparently decided not to continue operating the Louisa School. Ms. Rick was aware of her brother's intentions. On October 26, 1990, within the six-month period prescribed by his father's will, he executed a notarized "agreement" stating:

I, JAMES R. McELROY, hereby agrees [sic] to comply with the provisions of Section III, Subsection A. of the will of Frank McElroy, to pay JEAN M. RICK \$120,000.00, at the rate of \$500.00 per month for 20 years, less half (1/2) of the expenses of the Estate.

Mr. McElroy provided his sister with this document and began paying her \$500 per month according to the terms of his father's will and his "agreement."¹

On May 22, 1991, Mr. McElroy, acting for himself and as executor of his father's estate,² signed a purchase agreement to sell the Louisa School real property to Middle Tennessee Medical Center ("MTMC") for \$1,200,000. The closing was deferred until appropriate alternative arrangements were made for the persons residing at the school. In September 1992 Mr. McElroy, individually and as executor, sold the Louisa School's remaining assets to Medical Services Corporation in return for its agreement to pay him \$800,000 over the next two years. Also in September 1992, Mr. McElroy stopped making the monthly \$500 payments to Ms. Rick in accordance with his October 1990 "agreement."³

As the closing date for the real estate transaction neared, MTMC noted several exceptions in the title insurance policy obtained by Mr. McElroy. The most significant exception involved "[a]ny claim or interest of Jean M. Rick as an heir or any undisclosed heirs of the Estate of Frank McElroy." MTMC's lawyer insisted that Mr. McElroy provide a clean title insurance policy before the closing. Old Republic Title Insurance Company agreed to remove the exception regarding Ms. Rick and the other heirs of Frank McElroy in return for Mr. McElroy's agreement to file a declaratory judgment action to clarify whether Ms. Rick had a colorable claim against him or her father's estate.

On April 18, 1994, Mr. McElroy filed a petition for declaratory judgment in the Probate Court for Rutherford County where the probate of his father's will was still pending. He asserted that he had no obligation to make further payments to Ms. Rick because her share of the expenses to administer their father's estate exceeded the balance he owed her. On the same day, Mr. McElroy and MTMC closed the sale of the real property. Mr. McElroy, individually and as executor of his father's estate, executed a warranty deed conveying the real property to MTMC.

The probate court eventually heard Mr. McElroy's petition for declaratory judgment in August 1996. Neither MTMC nor Medical Services Corporation were parties to this proceeding, and the record contains no indication that they were aware of this hearing. On October 1, 1996, the probate court filed an interlocutory order concluding that "the execution and delivery of the Agreement⁴ created a personal liability of the Executor [Mr. McElroy] to pay this sum and if not paid

¹In the 1996 probate proceeding, Ms. Rick argued that her brother's agreement did not comply with the terms of her father's will because it reduced the monthly \$500 payments by one-half of the expenses of her father's estate. The probate court was apparently not persuaded by this argument. As best we can determine, Ms. Rick did not renew this argument after the probate proceeding was transferred to the trial court, and it was not addressed by the trial court in this proceeding. Accordingly, the issue is not before us now.

²Frank McElroy's will gave his executor "full power and discretion in the management and control of . . . [his] estate" including the right "to sell, mortgage, lease, pledge, convey, transfer or otherwise dispose of all or any portion of any real or personal property."

³By this time, Mr. McElroy had paid Ms. Rick \$11,500.

⁴The "Agreement" referred to by the probate court is presumably Mr. McElroy's October 26, 1990 agreement.

or otherwise carried out would subject the Bequest to the imposition of a charge or lien upon all the real and personal property comprising the Bequest in order to secure compliance with the Agreement.” The probate court also concluded that Mr. McElroy had wrongfully stopped paying Ms. Rick and he currently owed Ms. Rick \$22,035.41.

The probate court also imposed a \$51,913.41 lien “against those assets which the Executor received in the Bequest” to secure not only Mr. McElroy’s existing \$22,035.41 debt to Ms. Rick but also the present value of the remaining balance of his obligation to Ms. Rick under his October 26, 1990 agreement. With regard to this lien, the probate court’s order stated:

In the event the Executor should again fail to remit payments as required in the Agreement Rick shall be entitled to enforce the lien granted herein upon proper Petition to any Court of competent jurisdiction subjecting the real and personal property comprising the Bequest to sale for satisfaction of the lien. The Court is aware that the Executor has already sold or disposed of some or all of the assets comprising the Bequest, but finds that any purchaser of the assets comprising the Bequest would have purchased same subject to the finalization of this Estate and would or should have had notice of this particular proceeding upon reasonable inquiry.

Mr. McElroy began paying Ms. Rick under the terms of the probate court’s October 1, 1996 order, but he stopped making payments again in February 1997. Ms. Rick commenced garnishment proceedings against her brother and was able to recover another \$2,534.38 before he died on May 13, 1997. Despite the sale of his inheritance, Mr. McElroy was essentially penniless when he died. In addition, he had never concluded the probate of his father’s estate.

On February 18, 1998, Ms. Rick sued MTMC and Medical Services Corporation in the Chancery Court for Rutherford County to enforce her lien against the property they had purchased from Mr. McElroy and to finalize the probate of her father’s estate. On June 10, 1998, the trial court assumed jurisdiction over the probate proceedings and appointed a Murfreesboro attorney as the administrator of Frank McElroy’s estate. Following a bench trial, the trial court entered an order on May 31, 2000 concluding

1. That in accordance with Hutchinson vs. Gilbert 86 Tenn. 464 (1888), upon the death and probate of the Law Will and Testament of Frank McElroy in 1990, a charge or lien arose by operation of law against all of the real and personal property devised to the Testator’s son and Executor, James McElroy, in favor of Plaintiff, the Testator’s daughter, to secure payment to her of the legacy bequeathed to her in said Will.
2. That the provisions in the Will directing the Executor to elect whether or not to pay Plaintiff \$120,000 and the Executor’s timely election to do so, constitute a legacy to the Plaintiff as contemplated in Hutchinson.

Accordingly, the trial court determined that Ms. Rick had a \$55,917.57 lien against MTMC's real property and ordered the property to be sold at auction if MTMC did not discharge the lien by paying Ms. Rick \$55,917.57. The trial court also confirmed Ms. Rick's voluntary nonsuit of her claims against Medical Services Corporation. Thereafter, the trial court stayed the sale of the property after MTMC posted a supercedeas bond. MTMC has perfected this appeal.

II.

Ms. Rick's claim in this proceeding can succeed only if she has a lien on the property devised to Mr. McElroy. The parties focus their arguments on whether *Hutchinson v. Gilbert*, 86 Tenn. 464, 7 S.W. 126 (1888) provides a basis for imposing this lien. We have determined that *Hutchinson v. Gilbert* is inapplicable to this case. We have also determined that Mr. McElroy's obligation to pay Ms. Rick \$120,000 was a personal contractual obligation and, therefore, in the absence of a provision in Frank McElroy's will or evidence of a fraudulent conveyance, she was required to look only to Mr. McElroy or his estate for payment.

Unless the testator's will provides otherwise, the testator's estate is the primary fund for the payment of debts and legacies and will always be applied and exhausted first. *Overton v. Lea*, 108 Tenn. 505, 523, 68 S.W. 250, 254 (1902); 1 JACK W. ROBINSON, SR. & JEFF MOBLEY, PRITCHARD ON THE LAW OF WILLS AND ADMINISTRATION OF ESTATES § 494, at 736 (5th ed. 1994) ("PRITCHARD"). A corollary to this rule is that when the testator gives pecuniary legacies without indicating from what source the legacies are to be paid and then includes a general residuary clause disposing of both real and personal property as one mass or fund, the legacies are a charge on the entire residuary estate, including the real property. *Moore v. Moore*, 204 Tenn. 108, 116-17, 315 S.W.2d 526, 529-30 (1958); 6 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 51:16, at 137 (rev. 1962) ("PAGE"). *Hutchinson v. Gilbert* is an example of an application of this corollary.

Hutchinson v. Gilbert involves the construction of Sallie C. Pack's will. When Ms. Pack died, she owned approximately \$500 in personal property and a 120-acre tract of real property. She was survived by a daughter, M. S. Gilbert, and a granddaughter, S. F. Austin. Ms. Pack's will contained a specific \$1,000 bequest to Ms. Austin, as well as a residuary clause directing that the remainder of her property be divided equally between Ms. Gilbert and Ms. Austin. A dispute arose concerning whether the \$1,000 legacy to Ms. Austin should be considered a charge against the 120-acre tract of real property. Acting in accordance with what it referred to as the "rule of rules,"⁵ the Tennessee Supreme Court adopted

[t]he rule of construction that a gift or bequest of a money legacy, followed by a gift of the residue of the real and personal estate, indicates an intention that the former is to be paid out of the testator's real estate, if necessary to do so after paying debts, and will be a charge upon such real estate.

⁵The court explained that the rule of rules was that "the intention of the testator [is] the corner-stone upon which all construction must rest." *Hutchinson v. Gilbert*, 86 Tenn. at 469, 7 S.W. at 128.

Hutchinson v. Gilbert, 86 Tenn. at 469, 7 S.W. at 128. The court determined that Ms. Pack's primary intent was to leave Ms. Austin \$1,000 "at all hazards" and, therefore, that she must have intended "to charge her realty as well as personalty with the payment of the legacy." *Hutchinson v. Gilbert*, 86 Tenn. at 470, 7 S.W. at 128.

Hutchinson v. Gilbert is inapplicable to this case for two reasons. First, Ms. Austin's interests under Ms. Pack's will differ materially from Ms. Rick's interests under her father's will. Second, Ms. Pack's residuary estate contained real property, while Frank McElroy's does not.

We turn first to Ms. Austin's and Ms. Rick's respective interests. Ms. Pack explicitly gave Ms. Austin \$1,000 in her will. Frank McElroy did not make a similar monetary gift directly to Ms. Rick and, in fact, went to great lengths to avoid doing so. Thus, while Ms. Austin received a specific monetary legacy from her grandmother,⁶ Ms. Rick did not receive a specific monetary legacy from her father. Because Ms. Rick did not receive a specific gift of personal property directly from her father, there is no reason to determine whether her father intended such a gift to be a charge against real property passing under the residuary clause of his will.

Second, even if Section III(A) of Frank McElroy's will could somehow be construed to contain a \$120,000 monetary legacy to Ms. Rick, the principle of construction invoked in *Hutchinson v. Gilbert* would remain inapplicable to this case because Frank McElroy's residuary estate contained no real property. The real property associated with the Louisa School would have passed under the residuary clause of Frank McElroy's will only if his son did not elect to take the property.⁷ Once Mr. McElroy effectively exercised his right of election, no real property remained in his father's estate that could pass under the residuary clause in Section III(B).

After her brother elected to accept their father's gift of the real and personal property connected with the operation of the Louisa School, Ms. Rick was, at most, a residual beneficiary of an estate that essentially had no residue. Thus, in the absence of a monetary legacy or even a residuary estate, *Hutchinson v. Gilbert* provides no basis for imposing a lien on the former Louisa School property.

III.

Aside from the inapplicability of *Hutchinson v. Gilbert* to this case, there are two additional reasons for declining to burden the former Louisa School property with the unpaid balance of Mr. McElroy's personal obligation to Ms. Rick. First, whether by design or oversight, Frank McElroy's will contains no language that can reasonably be construed to reflect his intent to burden the Louisa School property with his son's personal obligation to his sister. Second, no other legal or equitable principle exists that warrants imposing the burden of Mr. McElroy's personal default on MTMC.

⁶A "legacy" is a specific gift or bequest by will of personal property. 1 PRITCHARD § 2, at 6; *Festorazzi v. First Nat'l Bank*, 264 So.2d 496, 505 (Ala. 1972); *In re Dungan's Estate*, 73 A.2d 776, 779 (Del. Super. Ct. 1950).

⁷Section III(A) of the will provides, in part, that "[i]f my son does not make such election, the assets mentioned in this subsection shall pass in accordance with subsection B below herein [the residuary clause]."

A.

When the courts are called upon to construe a will, their primary obligations are to ascertain the testator's intent and to give effect to that intent as long as it is not contrary to established law or public policy. *Winningham v. Winningham*, 966 S.W.2d 48, 50 (Tenn. 1998); *Fell v. Rambo*, 36 S.W.3d 837, 844 (Tenn. Ct. App. 2000). Construing a will requires the courts to consider the entire instrument, *Commerce Union Bank v. Warren County*, 707 S.W.2d 854, 858 (Tenn. 1986), and, when possible, to give effect to every word and clause in the will. *Bell v. Shannon*, 212 Tenn. 28, 40, 367 S.W.2d 761, 766 (1963); *Briggs v. Estate of Briggs*, 950 S.W.2d 710, 712 (Tenn. Ct. App. 1997). The courts should also base their construction on the natural and ordinary meaning of the words chosen by the testator, *National Bank of Commerce v. Greenberg*, 195 Tenn. 217, 224, 258 S.W.2d 765, 768 (1953), and should consider these words in context and in light of the general scope and purpose of the instrument. *Wright v. Brandon*, 863 S.W.2d 400, 402 (Tenn. 1993); *Daugherty v. Daugherty*, 784 S.W.2d 650, 653 (Tenn. 1990).

The construction of a will is a question of law for the court. *Presley v. Hanks*, 782 S.W.2d 482, 487 (Tenn. Ct. App. 1989). Thus, a trial court's construction of the terms of a will is not entitled to Tenn. R. App. P. 13(d)'s presumption of correctness. *Estate of Burchfiel v. First United Methodist Church*, 933 S.W.2d 481, 483 (Tenn. Ct. App. 1996); Tenn. R. App. P. 13(d). However, when a trial court uses extrinsic evidence to elucidate the terms of a will, the trial court's findings of fact based on this evidence are entitled to Tenn. R. App. P. 13(d)'s presumption of correctness. *In re Estate of Garrett*, No. M1999-01282-COA-R3-CV, 2001 WL 1216994, *5 (Tenn. Ct. App. Oct. 12, 2001) (No Tenn. R. App. P. 11 application filed); *Fisher v. Malmo*, 650 S.W.2d 43, 46 (Tenn. Ct. App. 1983).

B.

Frank McElroy's will defines the nature and extent of his son's interest in the Louisa School real property. As his father's executor, Section II of the will gave Mr. McElroy broad management power over the property, including the power to sell it if he deemed the sale "necessary or advisable for the payment of . . . debts or the advantageous administration of . . . [the] estate."⁸ In addition, as a devisee, Section III(A) of the will gave Mr. McElroy the right to obtain full, unencumbered title to all his father's real property, including the Louisa School real property. The nature of the devise in Section III(A) bears more scrutiny.

The law favors constructions of wills that result in the immediate, absolute vesting of a devise or bequest. 1 PRITCHARD § 493, at 732. Accordingly, a bequest or devise will be deemed to be absolute unless the will makes the right of the beneficiary to receive and keep it dependent on some condition. *See* 1 PRITCHARD § 492, at 729. Even though conditions are not favored, the courts

⁸ Ordinarily, the title to the real property of a solvent testator vests immediately in the devisees named in the will unless the will contains a specific provision directing the real property to be administered as part of the estate. Tenn. Code Ann. § 31-2-103 (2001); *Smith v. Heirs of Thomas*, 82 Tenn. 324, 325 (1884); *Gray v. Boyle Inv. Co.*, 803 S.W.2d 678, 684 (Tenn. Ct. App. 1990); *First Southern Trust Co. v. Sowell*, 683 S.W.2d 680, 881 (Tenn. Ct. App. 1984); 2 PRITCHARD § 630, at 150.

will enforce them, no matter how “whimsical or capricious”⁹ they may be, as long as they are plainly expressed, possible to perform, and consistent with law and public policy. *Third Nat’l Bank v. First Am. Nat’l Bank*, 596 S.W.2d 824, 829 (Tenn. 1980); *National Bank of Commerce v. Greenberg*, 195 Tenn. at 222, 258 S.W.2d at 768. If a will contains a conditional bequest or devise, the condition must be strictly performed before the title to the property will vest in the devisee or legatee, unless the will clearly indicates that substantial performance is sufficient. *City of Memphis v. Union Planters Nat’l Bank & Trust Co.*, 30 Tenn. App. 554, 571, 208 S.W.2d 758, 765 (1947).

A bequest or devise may be subject to a condition precedent or condition subsequent. 1 PRITCHARD § 160, at 253. Whether a particular condition is a condition precedent or a condition subsequent depends on the testator’s intent as reflected in the language of the will. 5 PAGE § 44.4, at 403. In the case of doubt, the law favors construing a condition as a condition subsequent rather than a condition precedent. *Lane v. Lane*, 22 Tenn. App. 239, 243, 120 S.W.2d 993, 996 (1938). No technical words are required to create either a condition precedent or condition subsequent. *Brannon v. Mercer*, 138 Tenn. 415, 421-22, 198 S.W. 253, 255 (1917); *Cannon v. Apperson*, 82 Tenn. 553, 566 (1885). A condition will be deemed to be a condition precedent if the act on which the estate depends must be performed before the estate can vest. 1 PRITCHARD § 160, at 254. A bequest or gift that requires an act to be performed within a fixed time, that requires an act to be performed as consideration for the gift or bequest, or that provides for a gift over on failure of the condition is generally interpreted to contain a condition precedent. 5 PAGE § 44.4, at 405.

Frank McElroy’s gift to his son of the Louisa School real property was subject to a condition precedent. This condition, however, was not the continued operation of the Louisa School. Rather, it was Mr. McElroy’s agreement to take on a personal financial obligation to Ms. Rick. Once Mr. McElroy satisfied this condition, the title to the Louisa School real property vested in him absolutely and unconditionally, subject only to the remaining claims against his father’s estate. There is no dispute that Mr. McElroy satisfied the conditions in Section III(A) of his father’s will. Therefore, by operation of law, Mr. McElroy acquired title to the Louisa School real property on October 26, 1990.

The only remaining question is whether Frank McElroy intended for the Louisa School real property to secure his son’s \$120,000 debt to his sister. His will does not explicitly state that the real property would be charged with this debt, and the will contains no language that can reasonably be construed to reflect his intent to permit his daughter to look to the real property if her brother defaulted on his debt after exercising his Section III(A) “election.” There is good reason for this.

The structure and language of Frank McElroy’s will reflect that he expected his son to decide within six months after his death whether to continue operating the Louisa School. If his son decided to keep the school open, Frank McElroy anticipated that his son would exercise his Section III(A) “election” and voluntarily take on a personal \$120,000 obligation to his sister. If his son

⁹ John W. Green, *Curious Cases of Conditional Bequests and Restrictions in Wills*, 20 Tenn. L. Rev. 644, 644 (1949). The Tennessee Supreme Court has observed that the courts should not pass on the reasonableness or fairness of a testamentary disposition, *National Bank of Commerce v. Greenberg*, 195 Tenn. at 223, 258 S.W.2d at 768, and therefore, that a testator “should be allowed to prescribe such reasonable conditions to his bounty as his own sense of propriety may dictate.” *Hughes v. Boyd*, 34 Tenn. (2 Sneed) 511, 516 (1855).

decided to close the school, he anticipated that his son would not exercise his Section III(A) “election” and that the real and personal property connected with the school would be liquidated and the proceeds divided equally between his son and daughter.

Frank McElroy most likely expected that his son would exercise his Section III(A) “election” and continue to operate the Louisa School. He knew that virtually all of his property was tied up in the school. He must also have known that making a \$120,000 bequest to his daughter would require diverting resources away from the school and that diverting these resources could jeopardize the school’s future or, at least, impair its ability to serve its students. Accordingly, to assure the continuation of the Louisa School, Frank McElroy intentionally included provisions in his will insulating the real and personal property connected with the operation of the school from any testamentary claim by his daughter. The insulation consists of replacing a \$120,000 bequest to his daughter with a his son’s personal contractual obligation to pay \$120,000 to his sister.

Regrettably, neither Frank McElroy nor the drafter of his will appear to have envisioned the possibility that his son might exercise his Section III(A) “election” and then close the school.¹⁰ Thus, the will contains no provisions defining his children’s rights and responsibilities in that circumstance. Rather than speculating what Frank McElroy might have done had he envisioned that his son might obtain title to the property and then sell the school, our analysis of Mr. McElroy’s and Ms. Rick’s rights and responsibilities must be based strictly on the language of their father’s will and the application of neutral legal principles.

The language in the will insulating the Louisa School property from claims by Ms. Rick applies no matter whether Mr. McElroy continued to operate the school or not. Because Frank McElroy insulated the Louisa School real property from any direct claim by Ms. Rick, it would be inappropriate to construe his will to enable her to make an indirect claim against the property by permitting her to use it to discharge her brother’s personal debts. Accordingly, the will provides no basis for imposing a charge or lien on the Louisa School real property to secure the payment of Mr. McElroy’s personal contractual debt to his sister.

C.

Finally, we perceive no other legal or equitable basis for permitting Ms. Rick to impose a lien on the Louisa School real property. Ms. Rick knew as early as 1990 that her brother intended to sell the school property. She took no formal legal action to protect herself until early 1997, even though he had ceased making his required monthly payments in September 1992. Whether this forbearance was the result of sisterly affection or reliance on the probate court’s October 1996 order granting the lien, the proceeds from the sale of the Louisa School property were long gone by the time she insisted that her brother honor his personal financial obligation to her.

¹⁰ It was clearly in Mr. McElroy’s personal financial interest to exercise his rights under Section III(A) of his father’s will, even if he did not intend to continue operating the Louisa School. Had he declined to exercise his Section III(A) rights, he would have shared the residue of a \$2,000,000 estate equally with his sister. By exercising his Section III(A) rights, Mr. McElroy obtained the bulk of his father’s estate, while his sister received \$120,000 at most.

While it is understandable that Ms. Rick may have relied on the lien authorized in the probate court's October 1996 order, her reliance was misplaced. The order was both interlocutory and mistaken. Mr. McElroy, by operation of law, obtained full and unencumbered title to the Louisa School real property in October 1990 when he satisfied the conditions in Section III(A) of his father's will. After that time, he had the sole prerogative to sell the property without court approval, and on April 18, 1994, he conveyed the property to MTMC. By the time the probate court issued its October 1996 order, the property itself was no longer within the probate court's jurisdiction, although the proceeds from the sale of the property may have been. Accordingly, there is no legal or factual basis for the lien authorized in the probate court's October 1996 order.

Both the parties and the trial court must have sensed the tenuous validity of the lien in the probate court's October 1996 order. Accordingly, they focused their attention on *Hutchinson v. Gilbert* as an alternate justification for the lien. Just as we determined that *Hutchinson v. Gilbert* fails to provide a legal basis for the lien, we also conclude that reliance on the probate court's October 1996 order does not provide a basis for requiring MTMC to bear the burden of Mr. McElroy's default of her personal financial obligation to Ms. Rick.

IV.

We reverse the judgment awarding Ms. Rick a lien against the real property owned by MTMC and remand the case to the trial court with directions to dismiss Ms. Rick's petition. We tax the costs of this appeal to Jean M. Rick for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE